

rate of 2 annas per rupee *per mensem* would be payable. This agreement falls, in our opinion, under s. 2 of Act XXVIII of 1855.

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We may point out here that the authority of the cases in which a higher rate of interest has been considered to be in the nature of a penalty has been much shaken by the decision of the Judicial Committee of the Privy Council in *Balkishen v. Run Bahadur Singh* (1). In that case a solenamah provided for the payment of six per cent. interest upon the money payable under it, but under certain circumstances the rate was to be doubled. Their Lordships observed: "They do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solenamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others."

We are therefore of opinion that the lower Appellate Court is wrong in disallowing the stipulated rate of interest. We set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs.

K. M. C.

Appeal decreed.

Before Mr. Justice Mitter and Mr. Justice Grant.

RAM KISHORE GANGOPADHYA (ONE OF THE DEFENDANTS) v.
BANDIKARATAN TEWARI CHOWDEHY (PLAINTIFF).^a

Limitation Act, 1877, Art. 144—Suit for possession.

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On the 7th December 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of their common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the

* Appeal from Order No. 374 of 1885, against the order of Baboo Rajendra Coonar Bose, Subordinate Judge of Mymensingh, dated the 18th of July 1885, reversing the order of Baboo Shumbhu Chandra Nag, Munsiff of Issurgunge, dated the 26th of March 1885.

(1) I. L. R., 10 Calc., 305.

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22nd December 1871, purchased it in the name of *E*. *B* then brought a suit to enforce his mortgage against *F*, the heir of his mortgagor, and on the 8th December 1873 obtained a decree which on special appeal was confirmed by the High Court on the 21st December 1875. On the 6th December 1875 *A*, *C* and *K* had brought a suit for the possession of the 4-annas share against one Mukund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B*. The suit was finally decided in their favor on the 29th July 1879. In the meantime, that is somewhere in 1876, *B* had contrived to take possession of the whole share. In 1883 symbolical possession was obtained under the decree of the 25th July. *B* then executed his mortgage decree, and attached the 4-annas share, excluding the portion which stood in the name of his benamidar. *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B* on the 19th July 1884.

Held, that the suit, having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under Art 144 of the Limitation Act.

THE facts of this case, so far as they are material on the issue of limitation, are these :—

One Bhubanmoyee was the owner of a 4-annas share of the property in dispute. Shibdoyal Tewari, the grandfather of the plaintiff, obtained a decree against her, and, on the 7th December 1863, in execution of that decree, purchased the said share and obtained symbolical possession of it on the 28th December 1870.

It appears that on the 4th March 1863, the defendant No. 1 had advanced a sum of Rs. 600 to Bhubanmoyee and Tripura Sundari on a bond in which the said 4-annas share was hypothecated to him. It also appears that some arrangement was come to between the parties to this transaction, under which the 4-annas share was left in the possession of the mortgagee, as lessee, from the year 1270 to the year 1277; and it has been found in this case that at the time when possession was being made over to Shibdoyal under his purchase, the property was in the possession of the mortgagee, the defendant No. 1.

Shibdoyal was a member of a joint Hindu family, the other members of which were Jadu Nath and Biswa Nath. There was a partition amongst the members, and under that partition, a 1-anna 5-gundas share was allotted to Shibdoyal, a 1-anna share.

to Jadu Nath, and a 1-anna 15-gundas share to Biswa Nath. It appears that a decree was passed against Biswa Nath, in execution of which, the defendant No. 1, on the 22nd December 1871, purchased Biswa Nath's interest in the property in the benami of one Kali Kishore.

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After the death of Bhubanmoyee, the defendant No. 1 brought a suit against one Debendra Kishore Acharji, as representing Bhubanmoyee's interest in the property, to enforce his mortgage. In that suit one Mukunda Kishore Acharji intervened, alleging that he had purchased the property as the property of Tripura Sundari. It may be stated here that, upon the findings of the lower Appellate Court, it is clear that Tripura Sundari had no interest in this property, and that the person who was entitled to it was Bhubanmoyce.

On the 28th November 1883, the suit of the defendant No. 1 was decreed in his favor, and that decree was confirmed by this Court in special appeal on 21st December 1875. But immediately, that is, on the 6th December 1875, a suit was brought by Shibdoyal, Jadu Nath, and Kali Kishore, the benamdar of the defendant No. 1, against Makunda Kishore to obtain possession of the whole 4-annas share, alleging that Makunda Kishore had ousted them in Bysack 1278, that is to say, on the expiry of the lease to defendant No. 1 which expired at the end of 1277.

It has been found by the lower Appellate Court that, whilst this latter case was pending in appeal below, the defendant took possession of the whole 4-annas share, but eventually the High Court, on the 28th July 1879, confirmed the decree of the lower Court which was in-favor of the plaintiffs in that suit, and in execution of that decree, symbolical possession was taken in 1290, corresponding to 1883.

It appears that the defendant No. 1 then executed the mortgage decree which he had obtained against Debendra Kishore Acharji, and attached a 2-annas 15-gundas share of the property, excluding, of course, the 1-anna 15-gundas share of Biswa Nath which he had purchased in the benami of Kali Kishore. The present plaintiff, who is the grandson of Shibdoyal, to whom a 1-anna 5-gundas share was allotted on the partition of the family

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property, preferred a claim to the said share; that claim was rejected, and the property was ordered to be sold. The present suit was brought for possession on the 19th of July 1884.

The Court of first instance held that the claim was barred by limitation. The lower Appellate Court was of a contrary opinion, and it remanded the case to the first Court to take an account of the profits enjoyed by the appellant during his possession.

Against this decision, the defendant No. 1 preferred a second appeal, while the plaintiff objected to that part of the judgment which directed an account to be taken.

Baboo Jogesh Chunder Roy for the appellant.

Baboo Dwarika Nath Chakravati for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—The question of limitation must depend upon the question as to which Article of the Limitation Act is applicable to the present case. Having regard to the facts found by the lower Appellate Court, it is clear that Arts. 137 and 138 are not applicable, because at the time of Shibdoyal's auction purchase, the judgment-debtor was in possession, and Art. 138 is not applicable, because upon the finding of the lower Appellate Court, the purchaser, Shibdoyal, obtained possession through the lessee who was in possession at that time. Arts. 139, 140, 141 and 143 have evidently nothing to do with the present case. Therefore either Art. 142 or 144 must be applicable.

If Art. 142 were applicable, the plaintiffs' suit would of course be barred, because the date of dispossession or discontinuance of possession must under any circumstances have been in the year 1278 or 1871, and the suit having been brought in 1884 it would have been barred. But it appears to us that this Article is not applicable to the peculiar facts of this case. There was no doubt a dispossession which gave the plaintiff a cause of action. That dispossession was in the year 1871, when, on the expiration of the lease at the end of 1277, wrongful possession was taken by Makunda Kishore, and upon that dispossession

a suit was brought by the plaintiffs' predecessor in title, Shibdoyal, and also by his co-sharer Jadu Nath, and the defendant No. 1, who is setting up the plea of limitation because in that suit his benamdar, Kali Kishore, was one of the plaintiffs. Therefore the suit contemplated by Art. 142, having regard to the facts of this case, was brought and was decreed. But while that suit was pending in the first Appellate Court, the defendant No. 1, who was one of the plaintiffs in that suit, alone took wrongful possession of the property. A suit against him therefore would not under these circumstances have been a suit under Art. 142, because the dispossession which gave rise to the cause of action led to the suit which was instituted on 6th December 1875, and that was a suit which, upon the facts found in this case, was brought under Art. 142.

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The present suit therefore not coming under Art. 142, it must come under Art. 144, which is in these general terms:—"Possession of immoveable property or any interest therein not hereby specially provided for." The lower Appellate Court was therefore right in over-ruling the plea of limitation, because the adverse possession of defendant No. 1 commenced when he fraudulently took possession of the property in dispute in the year 1283, while he and his co-plaintiffs were prosecuting the suit which they had brought upon the dispossession by Makunda Kishore in the first Appellate Court. The appeal of the defendant No. 1 therefore fails.

As regards the objection taken by the plaintiff, we think that it is valid. Under the mortgage set up by the defendant No. 1, he has no right to the possession of the property. His right is simply to enforce that mortgage by the sale of the mortgaged property in execution of decree. He is therefore not entitled to retain possession of the property. If he has any remedy in respect of his mortgage, this decree will not in any way prejudice that right. If he has a right he may enforce it still by a separate suit, but under the mortgage he is not entitled to retain possession of the property.

That being so, the lower Appellate Court was not right in remanding the case in order that an account might be taken.

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The proper decree, upon the findings of the lower Appellate Court, would have been a decree for possession.

We accordingly modify the decree of the lower Appellate Court, and direct that a decree be made in favor of the plaintiff for possession of the property in dispute.

The plaintiff will recover wasilat under s. 211 of the Code of Civil Procedure from the date of the institution of the suit until delivery of possession or until the expiration of three years from this date, whichever event first occurs, with interest thereupon at six per cent. from date of ascertainment. The plaintiff will have his costs in all the Courts from the defendant.

K. M. C.

Decree modified.

Before Mr. Justice Wilson and Mr. Justice Porter.

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June 9.

RAM NARAIN KOER AND OTHERS (DEFENDANTS) v. MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).

Public Demands Recovery Act (Beng. Act VII of 1880), ss. 10, 23—Attachment under certificate procedure—"Estate," Meaning of—Act XI of 1859, ss. 5, 6—Notification of Sale, Specification of.

The certificate and notice referred to in s. 10, Beng. Act VII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding.

The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial.

Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of shares in the estate. *Secretary of State, &c. v. Rashbehary Mookerjee* (1) followed.

All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahas of which that share is composed.

* Appeals from Original Decrees Nos. 358—360 of 1885, against the decrees of Baboo Matadin, Rai Bahadoor, Subordinate Judge of Chupra, dated the 25th of April 1885.

(1) I. L. R., 9 Cal., 591.